

No. 82-1651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CRISPUS NIX, WARDEN, ET AL.,

Petitioner,

v.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE,
THE LEGAL FOUNDATION OF AMERICA
AND
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	1
PRELIMINARY STATEMENT	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE "INEVITABLE DISCOVERY" DOCTRINE IS APPLICABLE UNDER THE FACTS OF THIS CASE.	3
A. Inevitable discovery is a doctrine affecting causation, not the existence of a violation. Absence of bad faith is not relevant.	3
B. The Court of Appeals' evaluation of the "absence of bad faith" issue was erroneous.	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Benson v. Hightower, 633 F. 2d 869 (9th Cir. 1980)	11
Bowens v. Knazze, 237 F. Supp. 826 (1965)	8
Brewer v. Williams, 430 U. S. 387 (1977)	2, 7
Brown v. Illinois, 442 U. S. 590 (1975)	4
Butz v. Economou, 438 U. S. 378 (1978)	11
Colorado v. Quintero, cert. granted, 51 U. S. L. W. 3913 (U. S. S. Ct. June 30, 1983)	6
Edwards v. Arizona, 451 U. S. 477 (1981)	10
Foster v. Zeeko, 540 F. 2d 1310 (7th Cir. 1976)	8
Goss v. Lopez, 419 U. S. 565 (1975)	10
Harris v. New York, 401 U. S. 222 (1971)	5
Harrison v. United States, 392 U. S. 219 (1968)	4
Kastigar v. United States, 406 U. S. 441 (1972)	4
Massachusetts v. Sheppard, cert. granted, 51 U. S. L. W. 3913 (U. S. S. Ct. June 30, 1983)	6
Michigan v. Tucker, 417 U. S. 433 (1974)	5
Nix v. Williams, 285 N. W. 2d 256	3, 6
Oregon v. Bradshaw, 51 U. S. L. W. 4940 (U. S. S. Ct. June 23, 1983)	4, 10
Pierson v. Ray, 386 U. S. 547 (1967)	8, 9, 11
Pillsbury Co. v. Conboy, 51 U. S. L. W. 4063 (U. S. S. Ct. Jan. 11, 1983)	4
Procunier v. Navarette, 434 U. S. 555 (1977)	9, 10, 11
Rawlings v. Kentucky, 448 U. S. 98 (1980)	4
Solem v. Stumes, cert. granted, 51 U. S. L. W. 3929 (U. S. S. Ct. July 6, 1983)	10
Stone v. Powell, 428 U. S. 465 (1977)	2, 5, 12
Thomas v. Mississippi, 380 U. S. 524 (1965)	9
United States v. Agurs, 427 U. S. 97 (1976)	4
United States v. Calandra, 414 U. S. 338 (1974)	5
United States v. Ceccolini, 435 U. S. 368 (1978)	5
United States v. Leon, cert. granted, 51 U. S. L. W. 3913 (U. S. S. Ct. June 30, 1983)	6
United States v. Peltier, 422 U. S. 531 (1975)	5
United States v. Tucker, 404 U. S. 433 (1972)	5

Wong Sun v. United States, 371 U. S. 471 (1963)	4
Wood v. Strickland, 420 U. S. 308 (1974)	9, 10

STATUTES

42 U. S. C. sec. 1983	7, 8
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SECONDARY AUTHORITIES

W. LaFave, Search and Seizure sec. 11.4 (1978)	6
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BRIEF OF AMICI CURIAE,
THE LEGAL FOUNDATION OF AMERICA
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INTEREST OF AMICI CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm (as that term is defined in Internal Revenue regulations). Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in the Court of Appeals, in District Courts, and in the courts of various states. LFA is located upon the campus of the South Texas College of Law in Houston. It shares activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

Americans for Effective Law Enforcement ("AELE"), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal Constitutions. AELE has previously appeared more

than fifty-two times in this Supreme Court and more than thirty times in other courts, including the federal district courts, the federal courts of appeals, and various state courts, such as the supreme courts of California, Illinois, Ohio and Missouri. AELE appeared as amicus curiae in *Brewer v. Williams*, 430 U. S. 387 (1977), in which respondent's previous conviction for the same offense of murder was reviewed.

PRELIMINARY STATEMENT

Amici curiae have not, here, briefed the question whether *Stone v. Powell*, 428 U. S. 465 (1977), is dispositive. We agree with Petitioner's arguments in this regard. If *Stone v. Powell* embraces the present case, there is no need to consider the issues argued in this brief, and conversely, these arguments are offered only to meet the possibility that this Court could decide (as amici contend it should not) that the principles of *Stone v. Powell* are not dispositive.

SUMMARY OF ARGUMENT

This brief is concerned solely with the issue of inevitable discovery (or "hypothetical independent source," as the courts below denominated it). Amici curiae will not attempt to/duplicate the comprehensive briefing done by Petitioner on other issues, although we agree with Petitioner's analysis and wish to express support for it.

Amici submit that the Court of Appeals erred in holding that absence of bad faith is a required element of inevitable discovery. This doctrine, like independent source, is a doctrine affecting causation, not the existence of a violation; and the confusion of this doctrine with the separate policy issue of absence of bad faith is both illogical and inconsistent with the governing authority. Furthermore, the Court of Appeals misapprehended the meaning of absence of bad faith. It failed to distinguish adequately the existence of a violation from the separate question of presence or absence of bad faith, and it unfairly tested bad faith by a decision rendered years later rather than by the unsettled nature of the law facing the officer at the time he acted.

ARGUMENT

THE "INEVITABLE DISCOVERY" DOCTRINE IS APPLICABLE UNDER THE FACTS OF THIS CASE.

The Iowa state courts found that the body of Pamela Powers would have been discovered in any event, within a few hours of the actual discovery. This finding is supported by overwhelming evidence¹ and, as a finding of fact, should be conclusive. Under the circumstances, the inevitable discovery doctrine should be regarded as applicable.

- A. *Inevitable discovery is a doctrine affecting causation, not the existence of a violation. Absence of bad faith is not relevant.*

Inevitable discovery and independent source are principles that negate causation. They do not go to the existence of a constitutional violation. Specifically, these doctrines show that the discovery of the particular evidence is not causally related to the alleged violation, because its discovery was inevitable anyway. To put the matter differently, the inevitable discovery and independent source doctrines assume the existence of a violation, but recognize that the violation should not require exclusion of any and all evidence in the case, and in particular that it should not exclude evidence not found by reason of the violation—i.e., in the absence of causation.

As the Iowa Supreme Court pointed out, the inevitable discovery doctrine is a special case of the independent source doctrine.² In applying the independent source doctrine earlier this year, this honorable Supreme Court stated, "The issue is . . .

1 See note 9 *infra*.

2 285 N. W. 2d at 256. As the Iowa court pointed out, "inevitable" discovery overstates the requirement, and "hypothetical independent source" is actually a more descriptive name. *Id.*

whether the causal connection" requires suppression of the evidence. *Pillsbury Co. v. Conboy*, 51 U. S. L. W. 4063 (U. S. S. Ct. Jan. 11, 1983).

It is therefore illogical, bad policy, and inconsistent with the decisions of this Court to make the applicability of independent source or inevitable discovery depend upon the presence or absence of bad faith in the initial violation. The "fruit of the poisonous tree" cases, tracing back to *Wong Sun v. United States*,³ do not depend upon presence or absence of bad faith. The evidence is admissible if an independent source is shown, but otherwise it is excluded. Similarly, the "use immunity" cases, such as *Conboy*, *supra*, or *Kastigar v. United States*,⁴ require that the State demonstrate that it would have had the evidence in any event. Absence of bad faith is irrelevant.⁵ Similarly, when a suspect invokes his right to counsel during interrogation, and then—at a later time—engages in a valid waiver and confesses, this honorable Supreme Court has treated the issue as one of causation.⁶ Good or bad faith in the initial violation is irrelevant, because the question is whether the State would have had the evidence anyway.

3 371 U. S. at 471, 486 (1963) (poisonous tree doctrine inapplicable if "intervening" cause "sufficiently . . . purges the primary taint of the unlawful violation"). See also *Harrison v. United States*, 392 U. S. 219, 222-24 (1968) (applying *Wong Sun* to statements following illegally obtained confession); *Rawlings v. Kentucky*, 448 U. S. 98, 107-110 (1980); *Brown v. Illinois*, 442 U. S. 590, 600-04 (1975).

4 406 U. S. 441 (1972).

5 *Kastigar* states that the fact an officer acts "unintentionally" is irrelevant. 446 U. S. at 452. Cf. *United States v. Agurs*, 427 U. S. 97, 110 (1976) (it is the fact that the violation does or does not "result in" the offending event that controls, not the "moral culpability or willfulness" of the official).

6 E.g., *Oregon v. Bradshaw*, 51 U. S. L. W. 4940 (U. S. S. Ct. June 23, 1983). *Bradshaw* and related cases are discussed in part B of this brief *infra*.

This Court has been careful to limit the exclusionary rule to situations in which the deterrent function is not diminished by attenuation. In refusing to apply the rule in a wide variety of cases in which the "taint" has been attenuated, this Court has never made the absence of bad faith in the initial violation determinative.⁷ Thus in *Harris v. New York*,⁸ this Court allowed statements not conforming to the requirements of *Miranda v. Arizona* to be used for impeachment, on the ground that exclusion would go beyond the purpose of deterrence; the presence or absence of bad faith in the initial *Miranda* violation was not considered.

In the present case, there has been exclusion of the most relevant evidence, the fact that defendant led officers to the body of Pamela Powers. Excluding evidence that the State would have found in any event, without causation from the alleged violation, would go far beyond the appropriate confines of the deterrence function. In fact, it would deter good police work: The inevitable discovery doctrine, here, was based upon scientific and diligent, indeed exceptionally methodical, efforts

7 Thus this Court has withheld suppression when illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in habeas corpus, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another, unrelated case. *United States v. Ceccolini*, 435 U. S. 368 (1978); *Stone v. Powell*, 428 U. S. 465 (1976); *United States v. Peltier*, 422 U. S. 531 (1975); *Michigan v. Tucker*, 417 U. S. 433 (1974); *United States v. Calandra*, 414 U. S. 338 (1974); *United States v. Tucker*, 404 U. S. 433 (1972); *Harris v. New York*, 401 U. S. 222 (1971).

In none of these cases was the presence or absence of bad faith determinative. In fact, the existence of bad faith was not even considered.

8 401 U. S. 222 (1971). The Court simply stated that even if it could be "assumed" that the officers acted consciously so that they could be deterred, "sufficient deterrence" resulted from exclusion on direct.

by searching officers to find Pamela Powers' body,⁹ and such efforts should not be discouraged.

The absence of bad faith is a wholly separate reason for not applying the exclusionary rule, apart from inevitable discovery. Indeed, this honorable Court has before it, now, three cases dealing with the question whether absence of bad faith should itself be the basis of an exception to the exclusionary rule. *Massachusetts v. Sheppard*, *Colorado v. Quintero*, *United States v. Leon*, cert. granted, 51 U. S. L. W. 3913-14 (U. S. S. Ct. June 30, 1983). If a good-faith exception is created, and if absence of bad faith is required for inevitable discovery, there will be no need for the inevitable discovery doctrine at all, because in every case in which inevitable discovery is applicable, the good faith exception will apply. But irrespective of the result in those cases, the good-faith exception and the inevitable discovery doctrine serve different policy bases and should not be confused.

The imposition of the absence-of-bad-faith requirement below appears to be traceable to the invention of Professor Wayne LaFave, who proposed the requirement in a book.¹⁰ From there, the Iowa Supreme Court adopted it (but found an absence of bad faith);¹¹ the Court of Appeals took the requirement from the

9 The manner in which the officers inferred the location of the proper search area, and did so correctly, is described in the Iowa Supreme Court's opinion, 285 N. W. 2d 260-62. This was clever and diligent detective work. The plotting of the area into grids, organization of personnel, systematic assignment of search responsibilities, and directions to look into ditches and culverts (precisely where the body was found), are also described. *Id.* This was not just good police work, it was excellent police work, and it should not be discouraged or punished by exclusion.

10 W. LaFave, *Search and Seizure* sec. 11.4 (1978).

11 285 N. W. 2d at 258. The Iowa court cited no authority other than Wayne LaFave for this requirement. This authority should have been less persuasive than the decisions of the many courts that have considered the issue, cited by the Iowa court at 256-60.

Iowa court. The requirement is neither logical nor required by the opinions of this Supreme Court, and in fact it appears to be inconsistent with those opinions for the reasons given above.

B. The Court of Appeals' evaluation of the "absence of bad faith" issue was erroneous.

The Court of Appeals considered irrelevant the fact that this honorable Supreme Court divided by the closest possible margin—as have other courts—in deciding whether custodial interrogation even existed in the first place. The Court of Appeals used the opinion in *Brewer v. Williams*,¹² in fact, to determine that bad faith was not absent.¹³

In this, the Court of Appeals missed the point. The prior decision in *Brewer v. Williams* held only that a constitutional violation had occurred, and it did not decide whether Officer Learning acted in bad faith.¹⁴ The Court expressly reserved the issue of inevitable discovery. Furthermore, the Court of Appeals determined the issue as though the officer should have known what this honorable Supreme Court would decide years later. Instead, the presence or absence of bad faith is to be determined from information available to the officer *as a lay person, at the time he acted*.

Although there are no decisions of this Court defining absence of bad faith in this precise context, there are many cases dealing with the issue as a defense to civil rights damage claims under 42 U. S. C. sec. 1983. The seminal case is *Mr. Chief Jus-*

¹² 430 U. S. 387 (1977).

¹³ 51 U. S. L. W. at 2451.

¹⁴ The Court of Appeal's observations that "an opinion of the Supreme Court is no less declaratory of the law of the land when a majority joins it" and "the majority rules" are correct, but they indicate how badly the Court of Appeals missed this point. The opinion "declares the law" only as to those points the majority has considered.

tice Warren's opinion in *Pierson v. Ray*, 386 U. S. 547 (1967). There, officers had arrested civil rights demonstrators under a trespass statute that this Supreme Court held unconstitutional. Further, it was clear that the identity of the arrestees as civil rights demonstrators was influential in prompting the arrests, and the principles of law making the statute unconstitutional were clearly established.¹⁵ Nevertheless, Mr. Chief Justice Warren's opinion for the Court recognized the officers' defense of good faith, and said: ¹⁶

A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest, and being mulcted in damages if he does not.

Another court rejected a rule of law that would punish officers¹⁷

... every time they miscalculated in regard to what a court of last resort might determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in law than a police officer—held that no such violation occurred.

Mr. Chief Justice Warren pointed out that the trial judge, in *Pierson v. Ray*, had considered the officers' actions proper.¹⁸ The

15 The section 1983 defense is usually stated as "good" faith, not the "absence of bad" faith. Hence the sec. 1983 cases actually set forth a more stringent standard. The "absence of bad faith" should be easier to meet than the sec. 1983 standard.

16 386 U. S. at 555.

17 *Foster v. Zeeko*, 540 F. 2d 1510, 1314 (7th Cir. 1976); accord, *Bowens v. Knazze*, 237 F. Supp. 826, 829 (1965).

18 The trial judge had convicted the arrestees. The opinion in *Pierson* extended immunity to the judge, also, in absolute form, because of the need to preserve judicial independence.

Court of Appeals here held that not only the trial judge's opinion, but that of appellate judges on the Iowa Supreme Court and the Eighth Circuit,¹⁹ did not matter, contrary to Mr. Chief Justice Warren's view. Policemen, as he stated in *Pierson*, "are not charged with predicting the future course of constitutional law,"²⁰ and the view that others have taken, especially judges reviewing the case, is especially relevant in determining presence or absence of bad faith.

In fact, bad faith is present only if the officer has acted against clearcut, settled law. Thus in *Wood v. Strickland*,²¹ the majority said that bad faith could be shown by actions in "disregard of settled, indisputable law" or "basic unquestioned constitutional rights." The majority concluded by saying that bad faith could be shown²²

... only if the [official] has acted with such an impermissible motivation or with such disregard of [another's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

19 The parallels between *Pierson v. Ray* and the present case are striking. There, as here, there had been an intervening decision of the Supreme Court adjudicating the conduct of the officers unlawful under the Constitution. *Thomas v. Mississippi*, 380 U. S. 524 (1965). The difference is that, in *Pierson*, Mr. Chief Justice Warren did not use the holding of unconstitutionality to resolve the separate question of bad faith. There, as here, at least one judge came to a contrary decision on the question of unconstitutionality.

20 386 U. S. at 557.

21 420 U. S. 308 (1974).

22 420 U. S. at 321-22. See also *Procunier v. Navarette*, 434 U. S. 555, 562 (1977).

The Court of Appeals erroneously assumed that absence of bad faith could be made out only by proof of Officer Learning's subjective state of mind; thus it noted that "there is not even a self-serving

Justice Powell, in a separate opinion joined by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, considered even this standard excessively harsh, and pointedly argued that when this honorable Supreme Court divides in a "five-to-four decision," a finding of bad faith would rest upon "an unwarranted assumption as to what lay . . . officials can know about the law and constitutional rights." 23

Even today, the unsettled nature of the law governing custodial interrogation, when the accused has previously claimed his right to counsel, makes it a difficult area of the law and a continuing source of opinions of this Court. E.g., *Edwards v. Arizona*, 451 U. S. 477 (1981) (evidence excluded); *Oregon v. Bradshaw*, 51 U. S. L. W. 4940 (U. S. S. Ct. June 23, 1983) (evidence properly admitted). In *Bradshaw*, the Court divided by five to four in holding that a previous claim of right to counsel was validly waived by a question from the accused not directly related to his guilt or innocence. Cf. *Solem v. Stumes*, cert. granted, 51 U. S. L. W. 3929 (U. S. S. Ct. July 6, 1983) (concerning whether *Edwards v. Arizona* should be applied retroactively

statement from Learning himself." 51 U. S. L. W. at 2452. This was wrong, because bad faith depends upon "objective" as well as "subjective" elements. *Wood v. Strickland*, supra, 420 U. S. at 321. "[T]he appropriate standard necessarily contains elements of both." *Id.* The Court in *Wood* repeatedly emphasizes determining whether the conduct in question is "reasonable." This is a separate question from subjective belief and is not dependent on "self-serving" statements from the actor himself. E.g., *Id.* at 319, 321. And even more significantly, in *Procunier v. Navarette*, the Court upheld a summary judgment, not based on any testimony about subjective belief, but based upon the absence of "settled" decisions on the precise points of law—an element that is clearly present here.

- 23 Mr. Justice Powell referred to the five-to-four decision in *Goss v. Lopez*, 419 U. S. 565, (1975), pointing out that informed lawyers and judges would have thought before *Goss* that the contrary to its holding was "settled, indisputable, and unquestioned." 420 U. S. at 329. "[O]ur five-to-four splits," said Mr. Justice Powell, demonstrate "the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" *Id.*

to incriminating statements resulting from questioning during 10-hour car ride after suspect had invoked right to counsel).

The Court of Appeals held that "a design to obtain incriminating evidence by mental coercion is a design to violate the Constitution." 51 U. S. L. W. at 2452. This statement is indicative of the Court of Appeals' confusion of the issue of violation with the issue of bad faith. In fact, this Court has expressly rejected the Court of Appeals' reasoning. In *Procunier v. Navarette*,²⁴ prison officials were alleged to have "interfered with" and "confiscated" the plaintiff inmates' mail. This Court upheld a summary judgment for the prison officials, holding that the unsettled nature of the law²⁵ regarding the constitutionality of prisoner mail restrictions made the officials' conduct in good faith as a matter of law. The inmates argued that first amendment principles (if not the decisions) were clear, and that the officials had acted with intention to cause the interference in a manner tantamount to intention to violate the Constitution. This honorable Supreme

24 434 U. S. 555 (1978).

25 In ruling that Officer Leaming's state of mind was, legally, a "design to violate the Constitution, the Court of Appeals erroneously assumed that lack of bad faith in an error of law could not suffice. In fact, lack of bad faith in an error of law has been treated the same as lack of bad faith in an error of fact. *Butz v. Economou*, 438 U. S. 478, 507 (1978); *Pierson v. Ray*, 386 U. S. 547, 555 (1967).

For example, in *Benson v. Hightower*, 633 F. 2d 869 (9th Cir. 1980), the defendants were U. S. Customs officers who arrested Benson for smuggling gold. The trial judge later held that the Krugerrands Benson was importing were currency and therefore not declarable under the law. Benson claimed the defendants were in bad faith because their arrest was based on a mistake of law; the intent to arrest him was thus, he argued, an intent to arrest in violation of law. (This argument precisely parallels the conclusion of the Court of Appeals.) In *Benson v. Hightower*, the Ninth Circuit said:

Supreme Court dicta, analogous cases, and other authority support the rule that a good faith mistake of law should be treated no differently than a mistake of fact. [Citing *Butz v. Economou*, *Pierson v. Ray*.]

633 F. 2d at 871.

Court held that such reasoning was permissible only if the officials "intend[ed] the consequences of [their] conduct," i.e., intended to violate the Constitution specifically; but bad faith could not be made out merely by proof of design to commit an act as to which unconstitutionality was not definitively settled.²⁶

CONCLUSION

Amici curiae submit that the rule of *Stone v. Powell*, 428 U. S. 465 (1977), should be dispositive here. In the event it is not, however, this honorable Court should reverse the decision of the Court of Appeals and should hold the inevitable discovery doctrine applicable. The Court of Appeals erred, first, in holding that the inevitable discovery doctrine required a showing of the absence of bad faith. Bad faith as a policy factor affecting exclusion is fundamentally different from independent source or inevitable discovery, which affect causation. These different doctrines should not be confused. The opinions of this honorable Supreme Court have avoided confusing them. The Court of Appeals erred, secondly, in finding bad faith as a matter of law under these circumstances. The Court confused the violation itself with the separate question of bad faith, and it used law declared years later to determine the issue. The decisions of this Court indicate that bad faith is to be found only in the presence of actual malice or disregard of clearly settled constitutional law that a lay officer should have had no doubt of at the time and under the circumstances in which he acted. In the event the absence of bad faith cannot be determined as a matter of law, if it is necessary to reach the question, the case should be remanded for a hearing on that issue, not for a third wholly new trial.

26 434 U. S. at 566.

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